

My name is Andy Schatz. I was born and raised in West Hartford, was a member of the West Hartford Town Council (Democrat) from 1987 through 1995, and was in private law practice for over 30 years until retiring from active law practice in 2008. I am currently a resident of Westbrook. I submit this testimony only for myself and not on behalf of any organization. I will be out of the country through March 14, 2011 and therefore unable to appear in person at the hearing of the Government Administration and Elections Committee on March 11. I would be pleased to meet with any members of the Committee or Staff thereafter, or you may contact me by phone [REDACTED] after March 14 or by email [REDACTED] at any time.

Although I strongly support the concept of popular election of the President, the National Popular Vote compact before you (NPV) is seriously flawed – and should be rejected – because it does not require a majority vote – or even anything near a majority vote – to elect the President of the United States. NPV thereby permits – and effectively encourages – the election of a President from the fringes of the political spectrum who would not represent anything close to a majority of Americans – or even a majority of voters. Such an election would do much more serious damage to democratic principles than anything which has occurred or is likely to occur with the current Electoral College system.

This would be especially tragic given that through Instant Runoff Voting we now have the proven ability to assure a majority election without requiring voters to return to the polls, which the Founders did not have available when they established their method of electing the President nearly two hundred twenty-five years ago. Assuming that Connecticut wants to pursue popular election of the President in place of the Electoral College (which I hope we would), we need not accept an “any plurality” system such as NPV. Instead, we should be leaders rather than followers, and we should propose a system which protects that which has worked. Instant Runoff Voting would allow the establishment of a sound system, and we could honor Connecticut’s historic role as the originator of creative solutions to the conflict between the interests of the federal government and the States.

### **The Importance of Requiring a Majority**

NPV allows a minority/plurality of any size to elect the President, unlike the Constitution, which requires a majority (of Electors, and in the absence of a majority of Electors, a majority of States through their representatives in Congress).

As a preliminary matter, we should want the President to be elected by a majority of the people voting. Indeed, the major complaints about the Electoral College system surface precisely when the President is (or is likely to be) elected with less than 50% of the vote. This is so whether the loser actually got a majority or would likely have gotten a majority if third-party votes were realigned to their likely second choice. The concept of one-person, one-vote may not compel majority election, but it certainly supports it. Election of a President by 30% of the votes would incur significant wrath, particularly if

it were clear that the remaining 70% of the voters who opposed that candidate were more closely aligned.<sup>1</sup>

Most importantly, the historic/current requirement of a majority (of Electors in the Electoral College) to elect the President has led almost necessarily (although perhaps not by design) to the rise of a strong two-party system which, for all its flaws, has resulted in remarkable stability and the tendency to suppress baser instincts – or at least prevent them from becoming part of articulated policy. The practical need under our system of government to control the Presidency has forced people to come together – to compromise views – in order to capture the support of a majority. We should be very careful before abandoning rules that foster such stability.

This impact of the majority requirement on the two-party system has been generally accepted by those whose views are quite diverse. Fair Vote, one of the organizations most actively supporting NPV, describes the Electoral College negatively on its website for this reason. See <http://www.fairvote.org/problems-with-the-electoral-college> (“The Electoral College inadvertently reinforces this two party system.”). Protection of the two-party system was cited as a major reason to **oppose** NPV by John J. Turner, emeritus professor at West Chester University, who argued that the two-party system protects against extreme views and discrimination becoming part of policy. See <http://www.historycooperative.org/journals/ht/40.3/turner.html>.<sup>2</sup> And William C. Kimberling, Deputy Director of the FEC Office of Election Administration (and referenced as an authority on the Electoral College at the FairVote website cited above), in a May 1992 paper, *The Electoral College*, summarizes arguments on both sides but concludes that the Electoral College system enhances stability and protects against extremist policies. See <http://www.fec.gov/pdf/eleccoll.pdf>

To the extent that a group could elect a President with substantially less than a majority, it is not only much more likely that such groups (“parties”) will be formed, but the groups likely to form those parties will likely represent a viewpoint more outside the mainstream. While some might like the Green Party, and others might like the Tea Party, the prospect of either electing a President with 30% of the vote – and perhaps having a President whose views are opposed by 70% of the voters – hardly evokes the positive thoughts or feelings behind “one-person, one-vote” or democracy.<sup>3</sup>

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<sup>1</sup> Most of us probably have examples in organizations throughout our lives – from schools to non-profit organizations we serve – in which systems to elect the president/chair provided for run-off voting if necessary to ensure a majority election. We should want the same protection in electing the President of the United States – which the Electoral College provided and is now available through Instant Runoff Voting.

<sup>2</sup> In this sense, the two-party system encouraged by the Electoral College, however unintended, provides some of the practical protections against intense interest groups and resulting oppression for which we often look to the Bill of Rights and the courts.

<sup>3</sup> In the United Kingdom election in May of last year, for example, the popular vote was 36% Conservative, 29% Labour and 23% Liberal, with the additional 12% going to dozens of other parties, many regional. Selecting a President with 36% of the vote with similar results would hardly make anyone more comfortable that the “winner” was correctly chosen. While the British parliamentary system contemplates such a result, it also has a built-in protection which we would lack, because governing can only be done with the consent of other parties (which form a coalition and share ministries, and which would end the control of the plurality party if it did not cooperate). Unlike the British system, the U.S. President has substantial power which can be exercised without requiring formal legislation or the cooperation of other parties.

Moreover, this concern is even greater now that the Presidency has achieved practical powers in the conduct of affairs, both domestically and abroad, which probably go well beyond what the Framers might have expected and which would be frightening if in the hands of views at either extreme. Consider, for example, EPA or HHS controlled by either radical or reactionary interests. Are we really willing to risk having a powerful President elected and supported by a small portion of the voters (and smaller portion of citizens, many of whom are more satisfied with mainstream and don't vote)?

### **How Likely Is This Scenario?**

We should be very careful with causality. Some argue that there is little reason for concern with NPV because election of a U.S. President by less than 40% has only occurred twice (John Quincy Adams in 1824 and Abraham Lincoln in 1860) and even by less than 45% has only occurred on three additional occasions (Woodrow Wilson in 1912, Richard Nixon in 1968 and William Clinton in 1992). However, there is reason to think that it has occurred infrequently precisely because of the majority requirement in the Constitution. It is far more likely that minority election has not happened often because our system of electing a president strongly discourages it, rather than because it is an unnatural event; indeed, human beings are not necessarily naturally inclined to compromise. It is not hard to imagine individuals or groups with more extreme views taking a shot at winning the Presidency with 30-35% of the vote under an "any plurality" system such as NPV. Many jurisdictions (including municipalities and even some states) have had multiple-candidate elections in which one candidate garnered much smaller percentages of the overall vote but enough to win.<sup>4</sup>

We should also be careful not to overstate whether popular voting would have led to different results even in two-person races about which we like to complain. It is understandable that some were upset that George W. Bush was elected President in 2000 because he received more electoral votes, even though Albert Gore received more popular votes; but both candidates understood the system and campaigned based on that system at the time. There is no way of knowing who would have received more popular votes had both campaigns gone vigorously to every state. Indeed, during the 2000 campaign, there were often comments that Bush might receive more popular votes but Gore more electoral votes. Moreover, the last time before 2000 that the candidate receiving the most popular votes was not elected was 1876. Is it worth adopting an untested type of popular vote that poses significant concerns to overcome a problem which might not really exist?

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<sup>4</sup> Although the deeply entrenched two-party system probably deters third party candidacies even in state elections, where the peculiar majority requirement of the Electoral College does not apply, the recent low-plurality elections of governors provides additional support for the likelihood of similar results for President absent the Electoral College. Connecticut has had two such elections (Lowell Weicker with 40% in 1990 and John Rowland with 36% in 1994), and the 1998 election of Jesse Ventura in Minnesota (37%) and 2006 reelection of Governor Rick Perry in Texas (39%) are just two other notable examples.

Whether the recent proliferation of third-party elections in plurality races (see, e.g., <http://www.tnr.com/blog/jonathan-cohn/78504/third-party-spoilers-crist-tancredo>) is a permanent change brought on by the new electronic media or whether it is time-specific (such as due to Tea-Party activists), this may be a particularly vulnerable time to choose a new “any-plurality” election system (such as NPV), instead of a system (including a modified NPV) that includes an instant run-off, which is now technologically feasible. It does not take much to imagine a 2012 election that includes one or more viable third party candidates, either as a result primarily of great wealth or great notoriety. It is quite possible that we would elect a president who not only receives substantially less than a majority of the votes cast, but is also clearly opposed by more than a majority of the voters. NPV encourages such a result.

### **Instant Run-Off Voting**

Of more concern than whether Bush or Gore received more votes in 2000 should be that Gore would almost certainly have received a majority of the popular vote – even if both candidates had campaigned in all 50 states – had Ralph Nader’s votes been reallocated to whichever of the two major-party candidates was favored by Nader voters. Similarly, the elder Bush might have received more votes than Clinton had Ross Perot’s votes been reallocated in 1992. This is precisely what Instant Runoff Voting would permit.

Technology now allows us to reach a majority choice without requiring voters to return to the polls at a later date. Instant Runoff Voting permits voters to register a “second choice” (or more choices) at the time that they vote – thereby allowing votes for a losing candidate to be reallocated and counted in the ultimate selection between the top vote-getters (thereby reaching a majority) without a fresh round of voting. FairVote, which describes itself as “The Center for Voting and Democracy” and supports NPV, also supports Instant Runoff Voting, which it reports was “used in a growing number of American elections,” including city-wide elections in Portland, Maine, and Oakland, California, and a state-wide general election in North Carolina. See <http://www.fairvote.org/instant-runoff-voting>.

Again, isn’t it worth considering Instant Runoff Voting if it would eliminate the concerns posed by NPV?

### **Isn’t This What The Founders Would Have Done?**

Engaging in speculation about what the Founders would have done today is generally left to courts, but in this case, the record suggests that the Constitution might have included popular election if Instant Runoff Voting had been available.<sup>5</sup> While several at the Constitutional Convention were opposed to any system that would allow the people to directly elect the President (concerned that they would be swayed by notoriety), that was not a unanimous – or possibly even a majority – view. Wilson (PA)

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<sup>5</sup> The source for this discussion is the notes of James Madison of the Debates Concerning the Method of Selecting the Executive, at the Constitutional Convention during June 1 through September 6, 1787, contained at <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/elector1787.html>

and Mason (VA) articulated that popular election was best but presented practical problems. Sherman (CT) opposed popular election in part because the people at large “will never give a majority of votes to any one man. . . . If the choice be made by the Legislature, a majority of voices may be made necessary to constitute an election.” Wilson argued that while a majority might not be “a necessary principle of election . . . allowing the objection all its force, it may be obviated by the expedient used in [Massachusetts] where the Legislature by majority of voices, decide in case a majority of people do not concur in favor of one of the candidates. . . .” So popular election may have been rejected because it was an impractical way in 1787 to reach a majority.

That the desire for a majority election was a critical factor may also be seen in several direct votes on the issue in connection with the Electoral College. Mason proposed deleting the majority requirement “because it will rarely happen that one candidate will get a majority of votes, and the Senate would likely reappoint the incumbent, so deprive the Senate of that power.” The motion failed 9-2. A motion to replace “majority” with “one-third” – again to avoid giving power of election to the Senate – also failed 9-2.

What is remarkable about these discussions and votes is that nearly everyone agreed that election by Congress would be horrible and should be avoided – using the words “intrigue,” “cabal,” “faction,” “friction” and “violence.” They consciously decided that the Electors must be specially elected for this purpose, and even barred U.S. representatives and senators from serving as electors. They also thought it likely that many elections would result in no majority of electors supporting one candidate, thereby putting the election into Congress. Nonetheless, when faced repeatedly with the possibility of avoiding election of the president by Congress -- by deleting the majority requirement -- the Constitutional Convention repeatedly chose not to delete the majority requirement. It thus appears that the majority requirement was very important to the Constitutional Convention. Do we really think that we know better than they?

The importance to the Founders of “majority” decision may also be found in Federalist Paper #68, published by Alexander Hamilton on March 14, 1788 (as part of the campaign to sway popular support to adopt the Constitution as recommended by the Convention). Hamilton began by noting that the selection of the president was “the only part of the system, of any consequence, which has escaped without severe censure . . .” He reiterated the importance of popular election (“It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided.”). He stressed that the decision was given “not to any pre-established body, but to men chosen by the people for the special purpose” in order to avoid “cabal, intrigue, and corruption.” But, after describing a parade of horrors about election by “any preexisting bodies of men,” Hamilton describes how that very situation is acceptable to get to a majority:

“But as a majority of the votes might not always happen to centre in one man, and as it might be unsafe to permit less than a majority to be conclusive, it is provided that, in such a contingency, the House of Representatives shall select out of the candidates who shall have the five highest number of votes, the man who in their opinion may be best qualified for the office.”

Again, the desire to have a majority – to avoid an “unsafe” situation – trumped the hypothetical concerns with which it conflicts.

We can avoid that conflict now – and perhaps the Founders would have avoided that now – through Instant Runoff Voting. Why not preserve what is so important in majority election – and the stability which it brings – when we move to direct popular election of the President?

### **Connecticut Should Be A Leader On This Issue, Not Merely A Follower**

If a system requiring a majority is better and feasible, Connecticut should advocate that system for national popular vote (whether by Constitutional Amendment or compact) rather than accepting the flawed NPV compact currently proposed. After all, Connecticut (Roger Sherman and Oliver Ellsworth) proposed the Great Compromise in 1787, which resulted in the House and Senate having different methods of composition, and is the basis for the allocation of votes in the Electoral College. It would be fitting, and good policy, for Connecticut to lead a compromise that offers the best ideals of a national popular vote while avoiding the serious danger presented by NPV as conceived.<sup>6</sup>

Although the best solution is to use Instant Runoff Voting, even if the Connecticut Legislature were to determine that Instant Runoff Voting were unavailable, the Connecticut Legislature should reject NPV unless it limits its effect to those situations in which the “winner” of the election receives a specific percentage of the votes cast – preferably 50% but at least 40%. The proposed (model) statute could be easily modified by adding to the end of the second paragraph in Article III, after “national popular vote winner,” the following: “if, but only if, that presidential slate has received at least 50% [or 40% or 45%] of the national popular vote total.” Otherwise, election would revert to the Electoral College.<sup>7</sup>

The Legislature should not support a defective NPV in its current form simply because that is what has been approved by other states already. Not only have very few states actually approved NPV, but there is no indication that those states which have approved NPV would not approve an improved version of NPV if one were offered. Rather than merely follow others in enacting a dangerous statute, we should lead the nation to a resolution which enhances democracy in all respects.

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<sup>6</sup> Instant Runoff Voting for a Presidential election would be easier to effectuate with a Constitutional Amendment than with an interstate voting compact, as the States that are not part of the compact might not choose to reallocate. However, if the compact would be in effect because adopted by a majority of states, the other states would likely reallocate their votes as well through Instant Runoff Voting to protect their voters’ second choices.

<sup>7</sup> Although majority election is most desirable, as it is unlikely in the absence of Instant Runoff Voting, election by 40% or 45% at least assures that nearly a majority of voters favors one candidate, and the need to achieve that number would discourage fringe candidates.